Due and timely service of the within brief, by receipt of three (3) copies thereof, is hereby admitted this _____day of _____A. D., 19____.

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Attorney____for_____

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1924

A. J. BUCK,
Appellant

vs.

E. V. KUYKENDALL, Director of of Public Works of the State of Washington,
Appellee

NO. 345.

REPLY BRIEF OF APPELLANT

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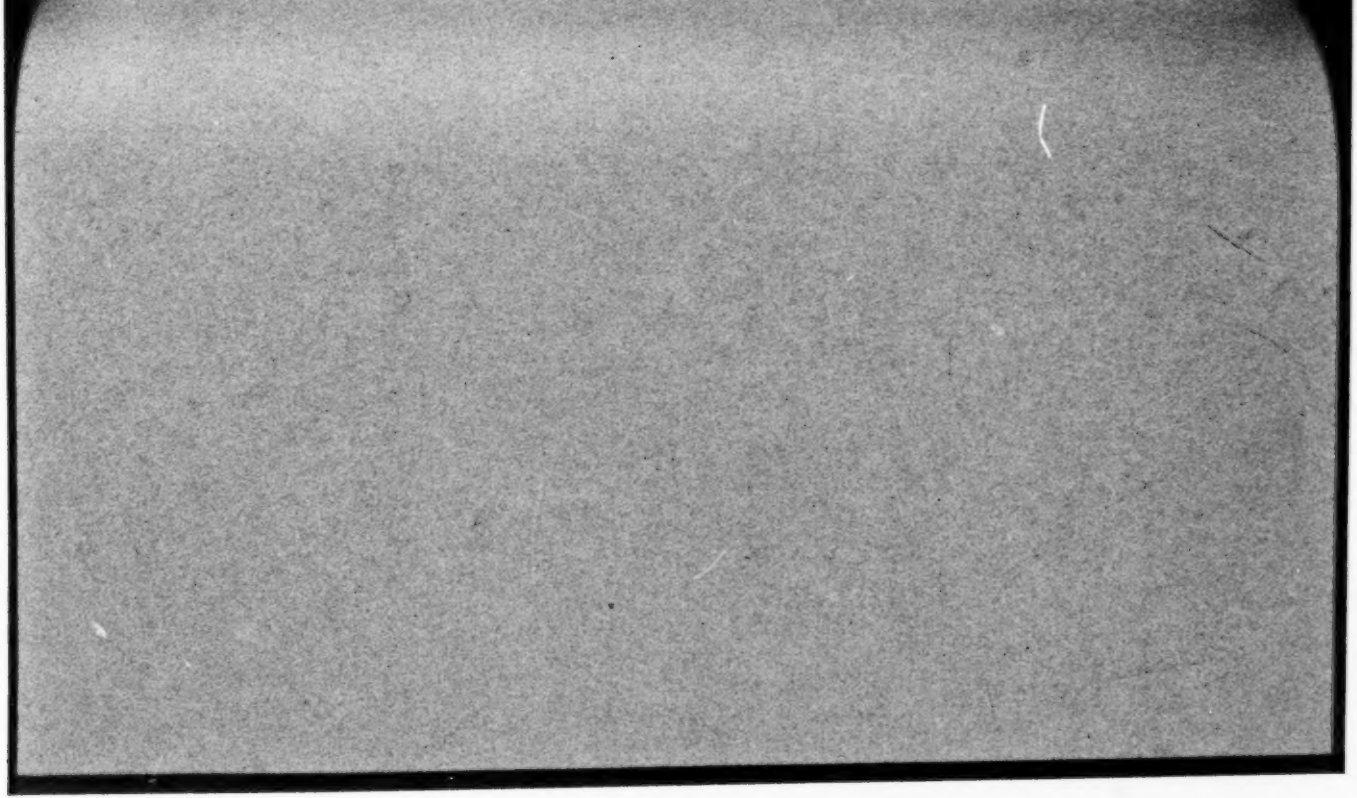

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REPLY BRIEF OF APPELLANT

Counsel for appelle in their brief have included what is claimed certain statements of fact covering Pages 12 to 16 inclusive. The Court is not given any information in what respect laws of twenty-four States are similar to Sec. 4 of Chap. 111 of the Laws of 1921. All such statements are outside of the record in this case.

Such brief does not mention the decisions set out in appellant's brief, except a few cases on the question of tolls and the appellant's position is sustained; and the cases of *Carlson vs. Cooney* and *Hendrick vs. Maryland.*

We call the Court's attention at this time to the following maxim set out in the opinion of your Honorable Court delivered by Mr. Justice Marshall:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, where the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered to its fullest extent."
>
> *Colieus vs. Virginia,*
> 6 Wheat. 399, 5 L. ed. 290.

Apply such maxim to every case cited in the brief of appellee, as well as in the brief to be presented by Commissions of 17 States as amici curiae.

This Court has no issue before it involving intrastate rates of common carriers, a tax for the appropriation by poles on a highway or street, the

tearing up of sidetracks, the grading of right-of-ways, grade crossings, inspection fees, quarantine regulations, pilot fees, fees for compensation for the use of public highways, motor vehicle regulations, compelling registration of non-residents, drivers licenses, headlights on locomotives, regulations of jitneys on the streets of municipalities, the requiring of certificates or licenses to engage in intrastate business, and any other matters, except as shown to be the issues herein.

It is claimed in the brief of appellee that the instant case is the first case to come before this Court involving the constitutionality of State legislation requiring a certificate or license as a prerequisite to the right to engage in interstate commerce. And that Congress has not legislated regarding such interstate operation and that if this State law can be nullified by placing one terminal outside of the State the result would be disastrous to States having similar laws.

The Supreme Court of the United States has had before it for decision and has decided from the first case to the last that the provisions of a State law requiring a certificate or license to engage in inter-

state commerce are unconstitutional; that as applied to highways, Federal aided, any State law endeavoring to create a monopoly of the use of such a highway was unconstitutional; that any attempt by State legislation to impose any burden on or prohibit intercourse between States falls within the inhibition of the Federal Constitution. That not only is the mere commodity of interstate commerce, but also all of the instruments, means and places where interstate commerce is carried on, comes under the Federal Constitution; that any State law undertaking to discriminate against interstate commerce in favor of intrastate commerce is unconstitutional; that no State can prevent any person from going across a State line and setting up a business and then coming into the first State to engage in interstate commerce; that interstate commerce is not regulated by the motive of the party engaged in the same or how many do engage in it.

A brief on behalf of Commissions of 17 States as amici curiae is to be presented.

It is claimed in both of said briefs that Congress not having legislated, the different States under

their police power are empowered to legislate as to the safety, health and welfare of their own citizens.

CONGRESS HAS LEGISLATED ON SUCH SUBJECT and the State of Washington entered into a contract by which it has received Millions of Dollars from the Federal Government to construct and reconstruct international and inter-county highways. Entire supervision of "TRAFFIC" has been lodged in the Secretary of Agriculture of the United States, and in our brief we set forth the sections of such "Federal Highway Act" showing such to be the fact. It is claimed, however, that the record in the instant case fails to show that the Secretary has prescribed and promulgated all needful rules and regulations for the carrying out of the provisions of this Act, including recommendations to Congress and the State Highway Department as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon, and therefore the State of Washington has a right to prohibit "TRAFFIC" on Federal Aided Highways as well as interstate "TRAFFIC" thereon. We consider that the doctrine has been established by the decisions cited in our brief, (not even

mentioned in the said two briefs) which declares that if no regulation is placed by Congress on interstate commerce then it is the intention of Congress to permit such commerce to be untrammeled and unrestrained by any State law. But Congress has acted under the provisions of said "Federal Highway Act" and until the Secretary of Agriculture has prescribed and promulgated necessary rules and regulations regarding "TRAFFIC," the State has no power to legislate in respect to "TRAFFIC" on such highways, as the entire power by the Act of Congress has been vested in the Secretary of Agriculture. It seems to us that such provisions of such Act have taken away from the State of Washington the power to prohibit or create a monopoly on Federal Aided Highways.

Further, in our brief we cited a large number of cases showing that the inaction of Congress in promulgating and prescribing rules covering interstate commerce from one State into another is equivalent to a declaration that such commerce shall be free from any State interference. The main object of commerce among States under the Constitution would be defeated by discriminating legislation of the State.

The Court has before it statements contained in the brief of the appellee as well as the brief of the amici curiae claiming a large number of the States have passed laws similar in character to the law of the State of Washington. Both briefs fail to show in what respect all of said laws are similar. But we are only concerned with Section 4 of the Washington law and the law of the State of Oregon in respect to the use of highways in such State in relation to motor propelled vehicles carrying persons for compensation. We plead the Oregon law by title (Rec. P. 9) and we herewith set out verbatim Sec. 4 of such law under which auto transportation companies receive a certificate or license.

"Section 4. No transportation company, as defined in section 1 of this act, shall hereafter operate any motor vehicle, motor truck, motor bus, bus trailer, semitrailer or other trailer in connection therewith for the transportation of persons or property for compensation on any public highway of this state without having first obtained from the public service commission of Oregon a certificate which shall set forth the special terms and conditions under which permission is granted to operate any of the vehicles above mentioned. No permit held or owned or obtained by any transportation company shall be assigned, leased or transferred except upon authorization by the public service commission of Oregon. A permit issued by the public service com-

mission to operate any motor vehicle or other vehicle prescribed by this act for compensation over any of the highways of the State of Oregon shall not be an exclusive right or license to operate over any route, road, highway, or between any fixed termini, but the special conditions of service and protection or such other condition as may be set out in such permit, together with the general regulations of the public service commission, shall be the conditions with which any other transportation company must comply before being granted a permit or license to operate motor vehicles or other vehicles in similar service, and any transportation companies complying with such conditions shall be entitled to a like permit or license."

Such provision of the Oregon law permits the use of the "Pacific Highway" from Portland, Oregon, to Vancouver, Washington, and the appellant having received such permit was halted at the boundary line at Vancouver and informed that the Camas Stage Company, a Washington corporation, has received from the State of Washington the exclusive monopoly to use such public highway from Vancouver, Wash., to Kelso, Wash., for operating motor vehicles carrying passengers for compensation and the appellant was threatened with arrest if he came across the boundary line carrying persons who had paid compensation for the carriage

in his motor vehicles on such "Pacific Highway" to Tacoma or Seattle, from Portland, Oregon.

If the statements contained in the said briefs of appellee and amici curiae that 17 States have enacted laws similar to section 4 of the Washington law it is indeed time that the commerce clause of the Constitution should be enforced. In a leading case the Supreme Court had before it the question of the constitutionality of the law of New York vesting a monopoly on the waters of New York for vessels operated by steam. Adjoining States passed retaliating laws. The Supreme Court decided that the State law was unconstitutional and that the very condition that had arisen by reason of such different laws had been foreseen and the commerce clause of the Constitution had been adopted so as to prevent such discriminating legislation by adjoining States.

Gibbons v. Ogden,
9 Wheat. 1, 6 L. ed. 63.

Other cases of similar import and reaffirming the principle announced in the above case have been cited in our brief.

In the case of *St. Louis v. Western Union Tel. Co.,* cited in appellee's brief, where a tax of $5.00 per pole was levied, this Court declared such ordinance constitutional on the ground that the pole appropriated the part of the street occupied by it. In the opinion of the Court, delivered by Mr. Justice Brewer it was said:

> "While for the purposes of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of a National government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation."

The record shows that appellant desires to use the "Pacific Highway" in the same manner as other citizens use the same and did not intend to use the same as a place of business, but as a thoroughfare (Rec. P. P. 6, 9).

We cite two cases not cited in our first brief. Where Congress has not acted in connection with regulation of interstate commerce, the Court held

that such silence by Congress prohibited State action as such particular commerce was declared to be free and untrammeled.

State ex rel. Barrett v. Kansas City Nat. Gas Co.

Vol. 44, No. 17, Sup. CT. Rep. 544.

A State Statute restricting transportation of natural gas within the limits of the State was held unconstitutional, as it prohibited interstate commerce. No Act of Congress had been passed as to such particular question.

Penn. v. W. Virginia,
262 U. S. 553. 67 L. ed. 117.

We find again that both the appellee and the amici curiae are endeavoring to cloud the real issue in this case by contending that section 4 of Chap. 111, of the laws of 1921, relate to regulations designed for the safety, health and welfare of the public, as well as furnishing compensation for the use of public highways by motor vehicles.

THERE ARE NO SUCH ISSUES IN THIS CASE. The appellant has paid all the fees and charges required in order to use the public high-

ways with his motor vehicles, as well as the drivers license fees, and has complied and is ready, willing and able to comply with all the motor vehicle laws in which is found the regulations relating to the use of public highways by motor vehicles.

The *Carlson v. Cooney* case, 123 Wash. 441, decided that such motor vehicle law contained the complete regulation of the use of public highways by motor vehicles and such fact is admitted in the amended complaint. (Rec. P. 3).

Respectfully submitted,

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MERRILL MOORES,
Solicitors for Appellant.